IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ALEXANDER HANNA and YON HUDSON,

Petitioners,

v. **No. _____**

GERALDINE SALAZAR, in her official capacity as Santa Fe County Clerk,

Respondent.

ALEXANDER HANNA AND YON HUDSON'S VERIFIED PETITION FOR WRIT OF MANDAMUS

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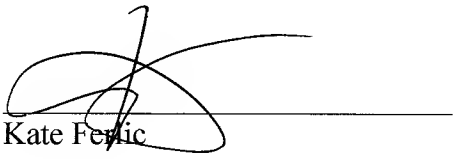
STATEMENT OF COMPLIANCE

The undersigned certifies that, pursuant to Rule 12-504(H) NMRA, this Petition complies with the type volume limitation in Rule 12-504(G)(3) NMRA in that contains 5,849 words and in Rule 12-305 NMRA is printed in fourteen (14) point font. The word count was obtained using Microsoft Word 2013.



Kate Fenic

COME NOW Alexander Hanna and Yon Hudson, by and through counsel, Egolf, Ferlic, and Day, LLC, and petition this Court for a writ of mandamus pursuant to Article VI, Section 3 of the New Mexico Constitution and Rule 12-504 NMRA to compel the Santa Fe County Clerk to perform her mandatory, non-discretionary duty to issue them a civil marriage license pursuant to NMSA 1978, Section 40-1-10 (1905) because they have met the statutory requirements for issuance. The County Clerk has no discretion to deny Hanna and Hudson a marriage license on the basis of their sex or sexual orientation because the marriage statutes do not contain a sex or sexual orientation requirement. Further, reading a sex or sexual orientation requirement into the marriage statutes would be unlawful discrimination in violation of what is commonly known as the Equal Rights Amendment ("ERA") and the Equal Protection and Due Process Clauses of the New Mexico Constitution. *See* N.M. Const. art. II, § 18.

I. JURISDICTION

1. The unlawful acts described herein were committed in Santa Fe County, New Mexico.
2. Petitioners are residents of New Mexico.
3. Respondent's office is located in Santa Fe County, New Mexico.

4. Jurisdiction is proper pursuant to Article VI, Section 3 of the New Mexico Constitution.
5. This petition is brought before the New Mexico Supreme Court pursuant to the doctrine of great public importance. *See State ex rel. Clark v. Johnson*, 120 N.M. 562, 570, 904 P.2d 11, 19 (1995).

II. PARTIES

6. Petitioner Alexander Hanna is a male resident of Santa Fe County who desires to marry his long-term partner, Yon Hudson, in Santa Fe County, and who is beneficially interested in this matter.
7. Petitioner Yon Hudson is a male resident of Santa Fe County who desires to marry his long-term partner, Alexander Hanna, in Santa Fe County, and who is beneficially interested in this matter.
8. Respondent Geraldine Salazar is, in her official capacity, the County Clerk for Santa Fe County.
9. The office of the County Clerk for each county in the state of New Mexico is established by Article VI, Section 22 of the New Mexico Constitution and is invested with the sole authority to issue marriage licenses in New Mexico. § 40-1-10.

III. UNCONTESTED FACTS

10. Couples are required to have marriage licenses before getting married in New Mexico. *Id.*; § 40-1-14; *cf. Rivera v. Rivera*, 2010-NMCA-106, ¶ 17, 149 N.M. 66, 243 P.3d 1148 (holding that New Mexico's marriage licensure statute is merely directory and that ceremonial marriages performed without a license are valid).

11. New Mexico provides many statutory protections, benefits, and responsibilities for couples electing to marry pursuant to Section 40-1-1.

12. New Mexico defines marriage as: "a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential." § 40-1-1.

13. The marriages prohibited by statute in this state are those 1) where at least one party is unable to legally contract, 2) between relatives to a close degree, and 3) with a minor. §§ 40-1-1, 40-1-5, 40-1-7.

14. County clerks have a mandatory, non-discretionary duty to issue marriage licenses to applicants qualified under statute, i.e. those able to contract under the law, not related to a specified degree, and at least eighteen years of age or with parental permission. §§ 40-1-1, 40-1-5, 40-1-7.

15. Petitioners appeared and applied for a marriage license to marry one another at the office of the Santa Fe County Clerk on June 6, 2013.

16. Petitioners are able to contract under the law, are unrelated, and are both at least eighteen years of age. *See* §§ 40-1-1, 40-1-5, 40-1-7.

17. On June 6, 2013, Respondent denied Petitioners a marriage license because they are both male.

IV. ARGUMENT & AUTHORITIES

A. WHETHER COUNTY CLERKS MAY WITHHOLD MARRIAGE LICENSES ON THE BASIS OF SEX OR SEXUAL ORIENTATION IS A PURELY LEGAL ISSUE OF GREAT PUBLIC IMPORTANCE

The New Mexico Supreme Court will exercise jurisdiction in an original mandamus proceeding where a fundamental constitutional question of great public importance is presented. *Clark*, 120 N.M. at 569, 904 P.2d at 18. "[W]hen issues of sufficient public importance are presented which involve a legal and not a factual determination, [the Supreme Court] will not hesitate to accept the responsibility of rendering a just and speedy disposition." *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977); *see also* Charles T. Dumars & Michael B. Browde, *Mandamus in New Mexico*, 4 N.M.L. Rev. 155, 157 (1974) (acknowledging the standard of great public importance). The New Mexico Supreme Court may exercise its original jurisdiction in mandamus to "prohibit unlawful or

unconstitutional official action." *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55.

The Supreme Court may choose to hear a petition for mandamus in its original jurisdiction where: (1) the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official; (2) the issue implicates fundamental constitutional questions of great public importance; (3) there are virtually no disputed facts; and (4) the case calls for an expeditious resolution that cannot be obtained through other channels. *Id.*

First, the acceptance of original jurisdiction is proper here because this case presents the purely legal issue of the County Clerk's nondiscretionary duty to issue marriage licenses once the statutory requirements are met. Second, because the Clerk, alongside clerks of numerous other New Mexico counties, is arbitrarily denying marriage licenses on the basis of the sex or sexual orientation of applicants, countless people are being denied equal rights, equal protection, and due process of the law, which ipso facto is a fundamental constitutional question of great public importance. Third, the facts here are undisputed: Petitioners attempted to obtain a marriage license and Respondent denied them a marriage license because they are both male. Finally, an expeditious resolution is required because of the scale and extent of this clear

constitutional violation, as well as the lack of direction to clerks—the officials with the sole authority to issue marriage licenses—throughout the state. As the legal maxim goes, "justice delayed is justice denied."

B. THERE IS NO SEX OR SEXUAL ORIENTATION REQUIREMENT TO OBTAIN A MARRIAGE LICENSE IN THE MARRIAGE STATUTES OF NEW MEXICO

1. The Plain Language of the Marriage Statutes Does Not Ban Same Sex Marriage

The cornerstone of statutory construction is plain meaning: "[u]nder the plain meaning rule, when a statute's language is clear and unambiguous, [a court] will give effect to the language and refrain from further statutory interpretation." *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579. If there is no ambiguity on the face of a statute, the reviewing court "is prohibited from construing the legislative intent." *State Taxation & Revenue v. Vaughn*, 98 N.M. 362, 364, 648 P.2d 820, 822 (Ct. App. 1982) (citation omitted). Critically, courts will not "read into a statute language which is not there, especially when it makes sense as it is written." *Hubble*, 2009-NMSC-014, ¶ 10; *see also State v. Nick R.*, 2009-NMSC-050, ¶ 23, 147 N.M. 182, 218 P.3d 868 ("The age-old Latin phrase *inclusio unius est exclusio alterius* is applicable here. It means the inclusion of one thing is the exclusion of the other.").

New Mexico defines marriage in purely contractual, gender-neutral terms. Under the laws of this state, marriage is defined as "a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential." § 40-1-1; *see also Vigil v. Haber*, 119 N.M. 9, 10, 888 P.2d 455, 456 (1994) (recognizing that marriage is a civil contract and treating a dispute over an engagement ring as a breach of contract claim); *In re Estate of Bivians*, 98 N.M. 722, 726, 652 P.2d 744, 748 (Ct. App. 1982) (recognizing that marriage is a contract and applying the doctrine of lex loci contractus to determine whether an out-of-state marriage is valid in New Mexico).

Beyond the requirement of the ability to legally contract, those wanting to marry must be unrelated to a close degree and have attained the age of majority. §§ 40-1-1, 40-1-5, 40-1-7; *Rivera*, 2010-NMCA-106, ¶ 16 ("[T]he only type of marriages our Legislature has expressly declared to be void are incestuous marriages and marriages between or with infants under the age of majority."). The marriage statutes impose no other requirement for marriage, or obtaining a marriage license. Specifically, there is no sex or sexual orientation requirement in New Mexico's marriage statutes. New Mexico is the only state in the country without legislation explicitly allowing or prohibiting same-sex marriage. *See* Nat'l Conf. of State Legs., *Defining*

Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws (2013), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.ahttp://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx#1. The plain meaning of the statute is gender-neutral.

2. The Suggested Sample Marriage License Application Form Does Not Impose a Sex or Sexual Orientation Requirement on Applicants

Petitioners anticipate that Respondent will argue that New Mexico's marriage statutes are ambiguous as to same-sex marriage, and will rely on the sample marriage license application form located at Section 40-1-18. This argument is based on the fact that the sample form has a place for the name of a male applicant and a female applicant. *Id.* Critically, however, the sample form is not substantive law but is provided to clerks for administrative purposes. Accompanying the sample form is the following text:

> [t]o insure a uniform system of records of all marriages hereafter contracted, and the better preservation of said records for future reference, the form of application, license and certificate shall be substantially as follows [in Section 40-1-18] . . . each blank to be numbered consecutively corresponding with page number of the record book in the clerk's office.

§ 40-1-17. Thus, the sample form is provided to simplify the clerks' clerical operations and identify what information clerks are required to collect and

retain pursuant to their official recordkeeping duties under Section 40-1-15 (requiring county clerks to record and index marriage records). The entries of the sample form do not create substantive law or impose additional requirements beyond those contained in the preceding statutory sections for obtaining a marriage license.

Furthermore, as Section 40-1-17 explicitly states, substantial compliance with the sample form is all that is necessary. So long as the clerk collects the information needed to effectively document the marriage, specifically the identities of the parties and the date, and properly records the number of the form in the office recordbook, Sections 40-1-17 and 40-1-18 are satisfied. The plain language of Section 40-1-17 makes clear that the sample form is merely intended as a guide for the clerk, in that it details the information that the clerk is to collect and record pursuant to her duties under Section 40-1-15; it does not establish additional requirements for obtaining a marriage license beyond those listed in Sections 40-1-1, 40-1-5, and 40-1-7.

Additional support for the view that the sample form does not create additional requirements for marriage licenses is found in the form's inclusion of an entry for the date of a premarital physical examination. § 40-1-18; *see also* § 40-1-11 (physician's certificate required before clerk may

issue marriage license). If the sample form's entry for male and female applicant creates a sex or sexual orientation requirement, then the entry for physical examination must also impose a requirement of a complete physical examination. However, on information and belief, county clerks do not currently require evidence of a premarital physical examination or a physician's certificate prior to issuing marriage licenses, in spite of the language on the form. *See* Op. Att'y Gen. No 95-02 (advising that county clerks do not have to obtain physician's certificates prior to issuing marriage licenses in spite of the sample form and Section 40-1-11, where the Department of Health repealed its regulations requiring premarital screening). By ignoring the form's entry for premarital physical examination but maintaining that the entry for male and female applicant creates a substantive requirement, New Mexico's county clerks are acting arbitrarily, capriciously and contrary to the Constitution and laws of New Mexico.

To read the entries in the sample form as creating substantive requirements for the license beyond those listed in the prior statutory sections is a mistake. The sample form is merely meant to guide county clerks in their duties as record-keepers, to "insure a uniform system of

records of all marriages hereafter contracted, and the better preservation of said records for future reference . . . ." § 40-1-17.

County clerks have a mandatory, non-discretionary duty to issue marriage licenses to qualified applicants. Because the civil marriage statutes are gender-neutral, Petitioners are qualified applicants. Respondent does not have the discretion to impose additional requirements to those enumerated in the civil marriage statutes; to do so violates the New Mexico Constitution.

C. READING A SEX REQUIREMENT INTO NEW MEXICO'S MARRIAGE STATUTES IS SEX DISCRIMINATION IN VIOLATION OF THE EQUAL RIGHTS AMENDMENT OF THE NEW MEXICO CONSTITUTION

In addition to contravening the plain language of the marriage statutes, Respondent's imputing a sex requirement to deny Petitioners a marriage license violates the Equal Rights Amendment of the New Mexico Constitution ("ERA"), which guarantees that "[e]quality of rights under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18.

1. Reading a Sex Requirement Into the Marriage Statutes Creates a Class of Similarly Situated Individuals Who Are Treated Differently on the Basis of Their Sex

Where a law would create "different results for a man than for a woman in precisely the same situation," a presumptively unconstitutional gender classification is at work. *Chatterjee v. King*, 2012-NMSC-019, ¶ 18, 280 P.3d

283. To determine whether individuals are similarly situated with respect to a given classification, "one must look beyond the classification to the purpose of the law." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 40, 126 N.M. 788, 975 P.2d 841. One "must ascertain whether the classification 'operates to the disadvantage of persons so classified.'" NARAL ¶ 40 (quoting Ruth Bader Ginsurg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 37 (1975)). The critical issue is whether a biological difference is used to subjugate a group of people. NARAL ¶ 40 (citing Laurence H. Tribe, *American Constitutional Law*, §§ 16-29, at 1584 (2d ed. 1988) ("The fundamental problem is the willingness to transmute woman's 'real' biological difference into woman's disadvantage.")). "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

Petitioners are in a class of individuals desiring to marry their partner. However, each was denied his marriage license on account of his sex: Hanna would have been granted a license to marry his long-term partner if he (Hanna) were female, and Hudson would have been granted a license to marry his long-term partner if he (Hudson) were female. Were it not for their sex, each Petitioner would be able to marry his chosen partner; their choice of marital partner was thus limited on the basis of their sex. The

Clerk's reading of the statutes prohibits Petitioners from engaging in generally accepted conduct solely on the basis of their sex.

2. New Mexico Courts Use Strict Scrutiny to Review Gender Classifications

In 1976, New Mexico enacted the ERA, which guarantees that "[e]quality of rights under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18. The ERA has no analog in the federal Constitution. *Id.* New Mexico's ERA provides greater protection than the federal Equal Protection Clause. *City of Albuquerque v. Sachs*, 2004-NMCA-065, ¶ 12, 135 N.M. 578, 92 P.3d 24; *see also* Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 Colum. J. Gender & L. 419, 431 (2008) (recognizing that the federal standard of review for sex discrimination under the Equal Protection Clause, intermediate scrutiny, is less demanding than any review under a federal equal rights amendment would be).

The seminal opinion on the ERA was authored by Justice Minzer in the case of *New Mexico Right to Choose/NARAL v. Johnson.* 1999-NMSC-005, ¶ 31; Linda M. Vanzi, *Freedom at Home Revisited: the New Mexico Equal Rights Amendment After New Mexico Right to Choose/NARAL v. Johnson*, 40 N.M.L. Rev. 215, 216 (2010) (describing the opinion as groundbreaking and stating that it "unequivocally transported New Mexico's equality jurisprudence into a new dimension"). The issue confronting the NARAL Court was whether New Mexico Human Services Department regulations that disallowed Medicaid funding for medically necessary abortions constituted

unlawful sex discrimination, where there was no analogous ban on funding for any medically necessary procedures men might require. *NARAL, 1*999-NMSC-005, ¶ 1.

The NARAL Court conducted a searching review of New Mexico history vis-à-vis sex discrimination, from the early territorial ERA to equalization of the rights to vote, hold public office, and own property, as well as the recognition that male pronouns would be construed to include females, and the modernization of the tax code and certain criminal laws. *Id.* ¶¶ 31-35. The Court wrote that the ERA, which was passed by an overwhelming margin, was the "culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this state." *Id.* ¶ 31.

Because of New Mexico's distinctive state history and characteristics, the court concluded that the New Mexico ERA provides greater protection for sex discrimination than that provided under federal Equal Protection jurisprudence. *Id.*; *see also State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (providing that, under the state's interstitial approach to constitutional interpretation, courts may depart from federal precedent to provide greater protection under the New Mexico Constitution on the basis of, inter alia, distinctive state characteristics). "To equate our equal rights amendment with the equal protection clause of the federal constitution would negate its meaning given that our state adopted an equal rights amendment while the federal government failed to do so." *NARAL*, 1999-NMSC-005, ¶ 30 (internal quotation marks and citation omitted). Critically, the ERA is a

"specific prohibition that provides a legal remedy for the invidious discrimination of the gender-based discrimination that prevailed under the common law and civil traditions that preceded it." *Id.* ¶ 36.

The NARAL Court gave meaning to its conclusion that the ERA provides a greater level of protection against sex discrimination by holding that classifications based on gender presumptively violate the ERA. *Id.* Furthermore, the Court determined that strict scrutiny is the proper review for gender classifications, and that the state must demonstrate that the classification is the least restrictive means to advance a compelling state interest. *Id.* ¶¶ 36, 54. Here, the denial of the fundamental right to marry based on sex also warrants strict scrutiny.

3. There is No Compelling State Interest for Imposing a Sex Requirement on Marriage License Applicants

Respondent denied Petitioners a marriage license because they are both male, and thereby discriminated on the basis of sex. Accordingly, she must show that such sex classification is the least restrictive means to advance a compelling state interest. *See NARAL*, 1999-NMSC-005 ¶¶ 36, 54. Respondent's actions bear no rational relationship to any legitimate state interest or any important or compelling state interest.

Other jurisdictions have considered state interests such as protecting the procreative purpose of marriage, protecting children or ensuring an optimal setting for child rearing, and protecting the institution of marriage. The Courts

have determined that none are compelling to support a ban on same sex marriage.

Many arguments against same sex marriage center on the fact that same sex couples cannot procreate like opposite sex couples can, and posit that the primary purpose of marriage is reproduction, and that opposite sex couples should be excluded because they cannot reproduce. This argument is made either on its own or in conjunction with the notion that same sex marriage distorts or undermines the institution of marriage, that marriage by its very nature is limited to relationships between men and women. However, critically, this objection fails to take into account the many marriages that do not result in children and the children that are born outside of marriage or by noncoital means. If child bearing were an essential part of marriage, there would be greater restrictions on childless marriages, such as those with or between individuals who are infertile, too old to procreate, or who do not want to have children. Moreover, child bearing outside of marriage or through alternate means such as adoption or by the various medical alternatives would be

Many hundreds or thousands of New Mexican children are currently living in a family headed by a same sex couple. While purporting to protect children by limiting marriage to opposite sex couples, the actual effect of a ban on same sex marriage subjects the children of same sex couples to second class status, impermanence of familial relationships, and the vulnerability that comes with the unavailability of innumerable government benefits. As such,

if the government interest in limiting marriage to opposite sex couples is protection of children, the actual effect has the opposite result, because the children of same sex couples are excluded from the social recognition, stability, and benefits that flow from having married parents.

Finally, marriage is much more than just a means to reproduce. There are major fundamental components to marriage beside sex and procreation, including emotional support, public commitment, and spiritual significance. *Turner v. Safley*, 482 U.S. 78, 83 (1987) (recognizing that a fundamental right to marriage exists even in the context of prisoners who cannot consummate their marriage) *superseded by statute on other grounds.*

The discrimination resulting from the Clerk's imputing a sex requirement into the marriage statutes is analogous to the ban on interracial marriages considered in *Loving v. Virginia.* 388 U.S. 1 (1967). In *Loving*, Mr. Loving was prohibited from marrying Mrs. Loving because of his race, and Mrs. Loving was prohibited from marrying Mr. Loving because of her race. The state had argued that there was no unlawful racial classification because both black and white individuals were punished equally for intermarrying. *Id.* at 8. However, the Loving Court concluded that disallowing white-black marriages, while allowing white-white marriages and black-black marriages, violated the Fourteenth Amendment's Equal Protection and Due Process Clauses: "we reject the notion that the mere

'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations . . . ." *Id.* at 2, 8. The Loving Court focused on the existence of the racial classifications in the first place, and that the lawfulness of a Virginia marriage depended on racial classifications: "the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to *eliminate all official state sources of invidious racial discrimination* in the United States." *Id.* at 10 (citation omitted) (emphasis added).

Here, the lawfulness of Petitioners' marriage depends not on their race, but on their sex. While Respondent may argue that the ERA is not implicated because both males and females are equally prohibited from entering into same sex marriages, the fact that marriage licenses are being denied to males who want to marry males and females who want to marry females makes the sex of the applicants the determining factor. The ERA does nothing if it does not prohibit the state from making the equal application of laws contingent upon one's sex.

Though Petitioners are similarly situated to other couples ready to marry, they are not able to procure a marriage license because of the County

Clerk's ultra vires addition of a sex requirement. But for their sex, Petitioners could proceed to marry the individual of their choosing. *See Baehr v. Lewin*, 852 P.2d 44, 51 (1993) (concluding that the denial of marriage to same sex couples is sex discrimination in violation of Hawaii's Equal Protection clause), *superseded by state constitutional amendment.* Making the lawfulness of one's marriage dependent on one's sex violates the ERA and the spirit of *Loving*. The New Mexico Constitution "neither knows nor tolerates classes among citizens." *See Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

D. READING A SEXUAL ORIENTATION REQUIREMENT INTO THE MARRIAGE STATUTES IS SEXUAL ORIENTATION DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION & DUE PROCESS CLAUSES OF THE NEW MEXICO CONSTITUTION

1. Denying Petitioners a Marriage License Denies the Petitioners Equal Protection Under the New Mexico Constitution

In addition to creating an impermissible sex classification, denying same sex couples marriage licenses creates an impermissible classification based on sexual orientation, in violation of the New Mexico Equal Protection Clause. *See* N.M. Const. art. II, § 18 (". . . nor shall any person be denied equal protection of the laws."). The guarantee of equal protection ensures that the government will treat similarly situated individuals in an

equal manner. *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 7, 138 N.M. 331, 120 P.3d 413. Equal protection "prohibit[s] the government from creating statutory classifications that are unreasonable, unrelated to a legitimate statutory purpose, or are not based on real differences." *Id.* (internal quotation marks and citation omitted). New Mexico's Equal Protection Clause "affords rights and protections independent of the United States Constitution." *Id.* ¶ 14 (internal quotation marks and citation omitted).

a. Denying Same Sex Couples Marriage Licenses Creates a Class of Similarly Situated Individuals Who Are Treated Differently on the Basis of Their Sexual Orientation

In this analysis, Petitioners are in the class of individuals desiring to marry the partner of their choice. But for their sexual orientation, they would have been issued a marriage license the same as any opposite sex couple. The Clerk's imputing a sexual orientation requirement into the marriage statutes thus creates a class of heterosexuals, who may marry, and homosexuals, who may not marry.

b. Strict Scrutiny is Applied to Analyze Classifications Resulting in Limitations to Fundamental Rights, Such as Marriage

Under the federal constitution, classifications based on sexual orientation are reviewed under a heightened rational basis standard. *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996) (striking a Colorado constitutional amendment forbidding recognition of sexual orientation discrimination on the basis that there was neither a rational basis nor a legitimate governmental interest in doing so) cf. XX (calling the Romer Court's standard "rational basis with bite").

However, marriage is a fundamental right. *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (recognizing that marriage is a fundamental right); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (calling marriage "one of the basic civil rights of man," "fundamental to the very existence and survival of the race"); *see Ridenour v. Ridenour*, 120 N.M. 352, 354, 901 P.2d 770, 772 (Ct. App. 1995) ("Freedom of personal choice in matters of family life is a fundamental liberty interest.") (internal quotation marks and citation omitted).

The implication of a fundamental right necessitates strict scrutiny under federal Equal Protection jurisprudence: "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388 (employing strict scrutiny to invalidate a state law that prohibited parents with outstanding child support obligations from marrying).

In determining what level of scrutiny to apply to Equal Protection challenges under the state Constitution, New Mexico courts "will look at all three levels to see which is most appropriate based on the facts of the particular case." *Breen*, 2005-NMSC-028, ¶ 15. Rational basis review "applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class." *Id.* ¶ 11. It is the challenging party's burden to show that the classification is not rationally related to a legitimate government purpose. *Id.* Intermediate scrutiny has been applied to Equal Protection challenges to sex and illegitimacy. *Id.* ¶ 13. It requires that the government show that the classification is substantially related to an important government interest. *Id.* Strict scrutiny is applied in New Mexico courts to review the

constitutionality of legislation that effects fundamental rights or suspect classes. *Id.* ¶ 12. The government must show that the legislation "furthers a compelling state interest." *Id.* Because marriage is a fundamental right, this Court should apply strict scrutiny. The fact that the marriages at issue are same sex marriages does not negate the fact that the right is fundamental. *See Hernandez v. Robles*, 855 N.E.2d 1, 24 (N.Y. 2006) ("[F]undamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.") (Kaye, C.J., dissenting). However, as shown below, a ban on same sex marriage in New Mexico will fail under any of the three levels of scrutiny.

c. There is No Rational Basis or Important or Compelling State Interest to Deny Marriage Licenses Based on Sexual Orientation

Even if the Court employs rational basis review, the denial of marriage licenses to homosexual individuals cannot stand. In *Romer*, the United States Supreme Court was confronted with a Colorado Constitutional amendment that prevented the state or municipalities from extending "protected status" to homosexuals, lesbians, or bisexuals, which essentially prevented those individuals from making any claim of discrimination. *Romer*, 517 U.S. at 624. It identified persons by a single trait, homosexuality, and then "denied them protection across the board." *Id.* at

633. The Court determined that the legislative classification had "the peculiar property of imposing a broad and undifferentiated disability on a single named group." *Id.* at 632. Further, "its sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus . . . ." *Id.*

Therefore, even though the Court purported to employ only rational basis scrutiny, the amendment was struck down as violative of the federal Equal Protection Clause in that it was supported by neither a legitimate state interest nor a rational basis. Critically, the Court concluded that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." *Id.* at 635. "The guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Id.* at 633-34.

As in *Romer*, so it is here. 517 U.S. 620. This Court cannot allow New Mexico's County Clerks to arbitrarily deny homosexual individuals access to marriage. *See Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (concluding that a ban on same sex marriage did not pass the rational basis test and was therefore in violation of both the state Equal Protection and Due Process guarantees).

2. Denying Petitioners a Marriage License Denies Them Due Process Under the New Mexico Constitution

In addition to creating impermissible sex and sexual orientation classifications, denying same sex couples marriage licenses violates the applicants' rights to due process under the New Mexico Due Process Clause. *See* N.M. Const. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law . . . ."). Marriage is a fundamental right that cannot be infringed upon without a compelling state interest. *Zablocki*, 434 U.S. at 383-86; *Ridenour*, 120 N.M. at 354, 901 P.2d at 772. Respondent's refusal to allow the Petitioners to obtain a civil marriage license violates their right to marry, to freedom of intimate association, to privacy and other fundamental liberties in violation of the Due Process Clause of the New Mexico Constitution. As a direct result of Respondent's denial, Petitioners are deprived of the legal rights, benefits, obligations, protections and responsibilities afforded to married couples under the laws of New Mexico.

E. PETITIONERS ARE ENTITLED TO A WRIT OF MANDAMUS REQUIRING THAT THE COUNTY CLERK ISSUE THEM A MARRIAGE LICENSE

A writ of mandamus is properly issued "to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." §

44-2-4. "Mandamus is appropriate to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *West v. San Jon Bd. of Educ.*, 2003-NMCA-130, ¶ 9, 134 N.M. 498, 79 P.3d 842 (internal quotation marks and citation omitted).

A ministerial duty is one that the official is "required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case." *Hart v. City of Albuquerque*, 1999-NMCA-043, ¶ 17, 126 N.M. 753, 975 P.2d 366 (internal quotation marks and citations omitted).

Respondent has shirked her mandatory non-discretionary duty to issue marriage licenses in accordance with the Constitution and marriage statutes of the State of New Mexico by denying Petitioners a marriage license because of their sex or sexual orientation. Petitioners have a clear legal right to a marriage license in Santa Fe County.

Petitioners have no plain, adequate, and speedy remedy in the ordinary course of the law.

V. CONCLUSION

Petitioners were denied a marriage license based on their sex or sexual orientation. Petitioners are qualified to obtain a marriage license under the plain language of the marriage statutes; there is no statutory basis for denial of a marriage license on the basis of sex or sexual orientation. There is no important or compelling state interest to discriminate against Petitioners; neither is there a reasonable relation or rational basis for such discrimination. Petitioners have suffered impermissible discrimination on the basis of their sex or their sexual orientation, contrary to the ERA, the Equal Protection Clause, and the Due Process Clause of the New Mexico Constitution, which—even more than the federal constitution—"neither knows nor tolerates classes among citizens." *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). A writ of mandamus should immediately issue to the Santa Fe County Clerk requiring her to grant Petitioners a marriage license consistent with her mandatory, non-discretionary duty to do so.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that the Court:

A. Issue a writ of mandamus requiring the Santa Fe County Clerk to issue them a marriage license;

B. Author a written opinion on the issues and legal arguments raised in this Petition;

C. Award Petitioners their damages, costs, and disbursements pursuant to Section 44-2-12 and Rule 12-504 (F); and

D. Award any such other further relief that is just and proper.

VERIFICATION

I swear that the foregoing is true and correct to the best of my knowledge.

Alexander Hanna, Petitioner

SUBSCRIBED AND SWORN BEFORE ME this 6 day of June, 2013.

Notary Public

My commission expires: August 27, 2016

I swear that the foregoing is true and correct to the best of my knowledge.

Yon Hudson, Petitioner

SUBSCRIBED AND SWORN BEFORE ME this 6 day of June, 2013.

Notary Public

My commission expires: August 27, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 27th day of June, 2013, I caused the forgoing Petition for Writ of Mandamus to be served on the following counsel.

John W. Day

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